No. 95-241

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In the

Supreme Court of the United States

October Term, 1995

DARRYL WONG, WILLIE WONG,
and DELPHINE WONG,
Petitioners,

v.

CITY COUNCIL OF THE CITY
OF CARSON and PLANNING
COMMISSION OF THE CITY OF CARSON,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal for the Second Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONERS DARRYL WONG, ET AL

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QUESTIONS PRESENTED FOR REVIEW

1. Is the City of Carson's Administrative Resolution 91-014, which conditions the City of Carson's issuance of a permit to terminate month-to-month tenancies and close the Avalon-Carson Mobile Home Park on the owners' payment of more than $1.4 million dollars to park tenants for mobile home coaches, moving expenses, dislocation fees, and stipends for low-income seniors and disabled tenants, a regulatory or physical taking, or both, under the Fifth Amendment of the United States Constitution?

2. Does the City of Carson's Administrative Resolution 91-014, which functionally requires the park owner to refund to tenants all of the profits the park owner has made, violate substantive due process in that it unreasonably deprives park owners of their "fair return" to which they are entitled under Carson's Rent Control Ordinance?

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONERS DARRYL WONG, ET AL

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in cases affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the

country and maintains its principal office in Sacramento, California.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. __, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Because of its public policy perspective and experience, Pacific Legal Foundation believes it can provide additional insight with respect to the issues before this Court in the present case. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the clerk of the Court.

Given PLF's extensive involvement in cases concerning the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments, PLF is particularly interested in ensuring that the bedrock principles of this Court are not eroded by implausible interpretations of takings case law by state or federal circuit courts. In *Nollan v. California Coastal Commission*, 483 U.S. 825, this Court reaffirmed the bright-line, two-part test set forth in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that land use regulations will effect a taking if they fail to "'substantially advance legitimate state interests,'" or if they "'den[y] an owner economically viable use'" of property. *Nollan*, 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. at 260 (brackets in original)). The two prongs of the test are stated in the disjunctive; *either* is sufficient to establish a regulatory taking without further analysis. *See, e.g., Nollan v.*

California Coastal Commission, 483 U.S. 825 (striking down a regulatory exaction under a first-prong *Agins* challenge); *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798 (striking down a regulation under a second-prong *Agins* challenge). Moreover, this Court has clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. *Nollan*, 483 U.S. at 836 n.3.

Members of this Court have expressed dismay about the difficulties which lower courts routinely encounter in attempting "to make sense of th[e] tension in [this Court's takings] caselaw." *Parking Association of Georgia, Inc. v. City of Atlanta, Georgia*, ___ U.S. ___, 132 L. Ed. 2d 273 (May 30, 1995), denial of petition for writ of certiorari, Thomas, J. and O'Connor, J., dissenting. The case at bar clearly illustrates the struggles of the lower courts in dealing with "the confused nature of some of [this Court's] takings case law...." *Id.* The decision below upheld an exorbitant financial exaction by the City of Carson that violated both prongs of *Agins*. The exaction failed to substantially advance a legitimate state interest and deprived petitioners of an economically viable use of their land. In considering whether the exaction was an unconstitutional taking, the court below merely paid lip service to *Nollan* and declined to engage in even the most cursory analysis.

"[T]he fact-specific nature of takings claims has led [this Court] to grant certiorari in takings cases without the existence of a conflict." *Parking Association of Georgia*, 132 L. Ed. 2d 274. Amicus Pacific Legal Foundation will illustrate that there *is* a significant conflict between the California courts and New York courts with respect to the proper application of *Nollan* and *Dolan*. This case presents this Court with an opportunity to clarify and expound on the regulatory takings doctrine of *Nollan* and *Dolan* and to resolve the current conflict between the state courts.

OPINION BELOW

The dismissal of the case by the California Supreme Court is attached to petitioner's Petition for Writ of Certiorari, filed August 9, 1995. The unpublished opinion of the California Court of Appeal is attached to petitioners' Petition for Writ of Certiorari. The Court of Appeal held, *inter alia*, that the City of Carson (City) may require petitioners, who paid $1.7 million for a mobile home park, to pay more than $1.4 million to the resident mobile home owners as a condition of closing this mobile home park. The appellate court recognized the applicability of *Nollan v. California Coastal Commission*, yet found that a condition which virtually extinguished petitioners' investment was not an unconstitutional taking.

STATEMENT OF THE CASE

Darryl, Willie, and Delphine Wong are owners of the Avalon Carson Mobile Home Park in the City of Carson. They acquired the property in June, 1979, and since that time have operated it as a mobile home park. The park contains 172 spaces, most of which are leased to mobile home owners for a monthly rental fee. Administrative Record (AR) 106, 6535.

Mobile home parks in California are a heavily regulated industry. Comprehensive statewide regulations include the Mobilehome Residency Law (Civ. Code § 798, *et seq.*) and the Mobilehome Parks Act (Health and Safety Code §§ 18200 to 18700). In addition, park owners seeking to convert their property to another use must comply with Government Code §§ 65863.7 to 65863.8 and other provisions. Local governments are authorized to require park owners to mitigate the impact of park closures on the

ability of displaced residents to find replacement housing, but such mitigation cannot exceed the reasonable costs of relocation. Gov't Code § 65863.7(e).

Shortly after the Wongs purchased their mobile home park, the City added to this existing matrix of regulation by adopting a mobile home rent control ordinance. The purposes of the park closure conditions promulgated by this ordinance include "protect[ing] the investment of mobile home coach owners, while allowing park owners to change the use of the[ir] property *without incurring unreasonable burdens*." Resolution No. 91-014, §4(D), Petition for Writ of Certiorari Appendix (App.) 32. (emphasis added.)

In March, 1988, the Wongs applied for permission to close the Avalon Carson Mobile Home Park. After a lengthy series of hearings and related procedures, the City agreed to the proposed closure only upon the condition that the Wongs comply with "mitigation" measures set forth in a document entitled Resolution No. 91-014. App. 23. This resolution, adopted by the City on March 19, 1991, requires the Wongs to make cash payments totaling $1,430,295 to mobile home coach owners residing in their park, almost equal to the $1.7 million purchase price of the park paid by the Wongs. AR 7, 161. The City's price for allowing the Wongs to go out of business exceeds all the profit the Wongs have earned on space rentals during their entire 16-year ownership of the park. Petition for Writ of Certiorari at 20.

The Wongs challenged the City's park closure conditions on the grounds that, *inter alia*, they effected a taking of the Wongs' property without just compensation, in violation of the Takings Clause of the Fifth Amendment. The trial court denied the Wongs' petition for a writ of administrative mandamus and dismissed their complaint for damages against the City. The Court of Appeal affirmed in an unpublished opinion. The California Supreme Court granted review on May 12, 1994. On May 11, 1995, the

California Supreme Court dismissed the case without decision, thereby invoking the jurisdiction of this Court, pursuant to 28 U.S.C. § 1257(a).

This case screams for review by this Court. The Wongs invested a substantial portion of their personal resources in this mobile home park and have struggled for 16 years under the City's onerous rent controls to try to make the operation a reasonable economic venture. Only after many years of effort did they conclude that further struggles would be fruitless. The lower court decision forces the Wongs to distribute the monetary value of their property among their tenants as the price of going out of business. Aside from the patent inequities of this situation, this Court should also review this case because it offers the unique opportunity to clarify the proper method for reviewing takings claims under the bright-line, two-prong test of *Agins*, as set forth in *Nollan* and *Dolan*.

ARGUMENT

I

THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE PROPER ANALYSIS FOR DETERMINING A COMPENSABLE TAKING AND TO RESOLVE THE PRESENT CONFLICT AMONG THE STATES

The appropriate framework for evaluating regulatory takings claims was established by this Court in *Agins v. City of Tiburon*: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation], *or* denies an owner economically viable use of his land [citation]." 447 U.S. at 260 (emphasis added). This two-prong approach for establishing a taking, either by a showing that the regulation does not substantially advance a legitimate

state interest ("first-prong *Agins* challenge") or by showing a denial of economically viable use of land ("second-prong *Agins* challenge"), has been reiterated by this Court in nearly every regulatory takings case in the last 15 years. Numerous state decisions and dozens of federal cases have also recited and relied on the disjunctive *Agins* test.

Regulatory takings have been found under either prong of *Agins*. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (striking down a regulatory exaction under a first-prong *Agins* challenge); *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798 (striking down a regulation under a second-prong *Agins* challenge). In the case at bar, neither prong of the *Agins* test revealed a regulatory taking because the Court of Appeal failed to even apply the test!

A. A Great Deal of Confusion Has Arisen Among the State and Federal Courts With Respect to the Proper Analysis for Determining a Compensable Taking

"The lower courts should not have to struggle to make sense of th[e] tension in [this Court's takings] case law." *Parking Association of Georgia, Inc. v. City of Atlanta, Georgia*, 132 L. Ed. 2d 273, denial of petition for writ of certiorari, Thomas, J. and O'Connor, J., dissenting. Lower state and federal courts have fallen into conflict and confusion in their application of *Agins* to regulatory takings. At least six different variations of the *Agins* test have arisen, leading to unpredictable and arbitrary outcomes of takings issues, thereby necessitating further guidance from this Court.

Some courts properly apply the disjunctive *Agins* test and recognize that satisfaction of either prong of *Agins* suffices to constitute a regulatory taking. *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), exemplifies the line of cases supporting the disjunctive

application of the *Agins* test.[1] The New York Court of Appeals struck down a regulation of rental property because the challenged law did not substantially advance legitimate state interests and denied plaintiffs economically viable use of their property. *Id.* at 1069. The Court of Appeals held that, under either prong of the *Agins* test, the regulation was invalid and constituted a regulatory taking. *Id.* at 1068-69. Conversely, in the case at bar, the Court of Appeal failed to apply either prong of the *Agins* test to the regulation at issue, instead analogizing to condominium conversion cases which had upheld relocation assistance conditions. App. 4-5. Because the appellate court saw "no reason why the result ought to be different in the context of mobilehomes" (App. 5), no *Agins* analysis was done.

Other courts have found a regulatory taking under the first prong of the *Agins* test without proceeding to analyze the second prong. *Manocherian v. Lenox Hill Hospital,* 643 N.E.2d 479 (N.Y. 1994), represents this line of disjunctive application cases.[2]

---

[1] *See also McDougal v. County of Imperial,* 942 F.2d 668, 677 (9th Cir. 1991) (reciting disjunctive *Agins* test in negative voice); *Kelly v. Tahoe Regional Planning Agency,* 855 P.2d 1027, 1033 (Nev. 1993) (reciting disjunctive *Agins* test); *Miller v. Columbia River Gorge Commission,* 848 P.2d 629, 630 and 630 n.1 (Or. Ct. App. 1993) (acknowledging that taking occurs if either prong of *Agins* test is satisfied); *Gardner v. New Jersey Pinelands Commission,* 593 A.2d 251, 257 (N.J. 1991) (reciting disjunctive *Agins* test in negative voice).

[2] *See also Schultz v. City of Grants Pass,* 884 P.2d 569, 573 (Or. Ct. App. 1994) (holding that imposed exaction of land was regulatory taking because exaction did not relate to impact of plaintiffs' proposed development); *Whitehead Oil Co. v. City of Lincoln,* 515 N.W.2d 401 (Neb. 1994) (holding that arbitrary and capricious government action did not advance legitimate state interest and thus was regulatory taking).

Despite this Court's clear statements and demonstrations that the two-part *Agins* analysis is a ***disjunctive*** test, some courts have applied the two prongs in the ***conjunctive***. Under this approach, no taking is found unless the plaintiff has satisfied ***both*** prongs. Thus, under the conjunctive application, one who alleges a regulatory taking must prove ***both*** that the regulation fails to substantially advance a legitimate state interest ***and*** that the regulation denies the owner economically viable use of her property. An example of this approach is *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th 1060 (1995). This clearly erroneous interpretation of this Court's regulatory takings doctrine has also been adopted in other states. *See Gerijo, Inc. v. City of Fairfield*, 638 N.E.2d 533 (Ohio 1994) (applying conjunctive *Agins* test).

A few courts have analyzed the first prong of the *Agins* test as a substantive due process claim. As with the conjunctive interpretation, however, this method consistently requires satisfaction of the second prong in order to find a regulatory taking that merits just compensation. An example of this approach is *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990).

Still other courts have applied both a substantive due process and a takings analysis. This method permits first prong *Agins* claims under either the "arbitrary and capricious due process" theory ***or*** the Fifth Amendment takings theory. This approach highlights the difference in standards of review between a due process claim and a takings claim and demonstrates how applying an exclusive due process theory to a takings claim permits lower courts to elude *Nollan*'s heightened standard of review for takings claims. Avoidance of the "essential nexus" test set out in *Nollan*, 483 U.S. at 837, places the burden of proof for takings claims on property owners. According to this Court's decision in *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304

(1994), however, the burden of proof for such claims properly lies with the government. *Id.* at 320. The nonexclusive substantive due process analysis was applied in *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992). *See also Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1995) (stating that facts which form basis of "arbitrary and capricious due process" claim may also form basis of takings claim). This flawed method may bear the closest resemblance to the appellate court's analysis in the case at bar where the court declined to undertake any type of takings analysis and simply asserted that a due process attack is not appropriate "unless the restriction is *clearly arbitrary and unreasonable*...." App. 6 (emphasis added).

Other courts apply a "balancing" test, which either subsumes or completely ignores the two-prong *Agins* test. This application effectively analyzes the second prong of the *Agins* test under the three-part balancing test set out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (balancing the economic impact of the regulation on the claimant, its interference with investment-backed expectations, and the character of the government action). Courts applying the balancing test either ignore the first prong of *Agins*, or they conclude that plaintiff has failed to satisfy the first prong. *See McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13 (1st Cir. 1993); *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-71 (4th Cir. 1991) (applying *Penn Central* balancing test to analyze second prong of *Agins* test after determining that plaintiff has failed to satisfy first prong); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. Ct. App. 1993) (remanding to District Court to determine existence of regulatory taking under "economically viable use" analysis in light of *Penn Central* balancing test).

Finally, some courts use second prong takings analysis exclusively, calling the first prong irrelevant. Among cases

subscribing to the second prong application, *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992), provides a unique analysis. *See also, Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (1989) (restricting takings analysis to second prong of *Agins* test despite lower court's finding that challenged regulation was invalid but not unconstitutional); *City of Pompano Beach v. Yardarm Restaurant, Inc*, 641 So.2d 1377, 1384 (Fla. Dist. Ct. App. 1994) (court finds second prong argument, based on an alleged invalid exercise of the police power, insufficient for a takings, noting that the trial court's embrace of an *Agins*' first prong takings analysis was simply "an understandable error given that 'takings' law is one of the most confused areas in American jurisprudence.").

It may be that the Court of Appeal in the case at bar has created yet another method of analysis, where ***no*** type of takings analysis need even be done because the use of the property in question (here, a mobile home park) can be analogized to other uses on other properties (such as condominium conversions), where no regulatory taking has been found. App. 4-6.

These various applications of the *Agins* test breed varying and unpredictable results, even when applied to the same fact situation. For example, if the court in *Gerijo, Inc. v. City of Fairfield*, 638 N.E.2d 533, had applied a ***disjunctive*** instead of conjunctive analysis, the plaintiff could likely have established a regulatory taking because the challenged ordinance failed to advance a legitimate state interest. *Gerijo*, 638 N.E.2d at 537. No further analysis would have been necessary. Further guidance from this Court regarding a uniform application of the *Agins* test would alleviate the unpredictability prevalent in current takings doctrine.

B. The State Courts of California Have Consistently Refused to Apply the Heightened Standards of Review Set Forth by This Court in Nollan v. California Coastal Commission and Dolan v. City of Tigard

Instead of accommodating the mandate of this Court, the California judiciary responded to *Nollan*'s requirement for a heightened standard of review by mischaracterizing the decision as a physical invasion case which did not apply to regulatory takings. The most notorious example in this line of decisions is *Blue Jeans Equities West v. City and County of San Francisco*, in which the California Court of Appeal proclaimed that *Nollan* applies only to "possessory" takings--even though no such term appears in the text of *Nollan* or in any other decision ever issued by this Court! 3 Cal. App. 4th 164, 169 (1992).

Although the *Blue Jeans Equities* holding was flatly preposterous on its face, it has been embraced by a majority of California's appellate districts as a means to avoid applying *Nollan's* requirement of heightened scrutiny to property regulations. *See Tahoe Keys Property Owners' Association v. State Water Resources Control Board*, 23 Cal. App. 4th 1459 (1994); *Saad v. City of Berkeley*, 24 Cal. App. 4th 1206 (1994); *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993), *cert. granted and judgment vacated*, 129 L. Ed. 2d 854 (1994); *City and County of San Francisco v. Golden Gate Heights Investments*, 14 Cal. App. 4th 1203 (1993); *see also Commercial Builders v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 118 L. Ed. 2d 593 (1992) (stating that *Nollan* did *not* "chang[e] the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land").

Even after this Court's express citation to *Nollan* as the standard applicable to nonphysical takings in *Yee v. City of Escondido*, ___ U.S. ___, 118 L. Ed. 2d at 167, California

courts have persisted in following the erroneous doctrine of *Blue Jeans Equities*, interpreting "possessory taking" to denote what the Supreme Court has always called a physical taking. *See, e.g., Westwinds Mobile Home Park v. Mobilehome Park Rental Review Board*, 30 Cal. App. 4th 84, 90 (1994) (refusing to apply *Nollan* to a regulatory takings case and asserting that "*Nollan* involved a statute which physically appropriated property"--despite the fact that no statute of any kind was at issue in *Nollan*, and no physical appropriation of property occurred or was alleged by either party).

The California judiciary's hostility to the Fifth Amendment rights of property owners should be no surprise to this Court. In *First English Evangelical Lutheran Church v. County of Los Angeles*, this Court noted that "the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." 482 U.S. at 311. Similarly, in *Nollan v. California Coastal Commission*, this Court noted that its approach to regulatory takings "is consistent with the approach taken by every other court ... with the exception of the California state courts." *Id.* at 839.

Since this Court's decision in *Dolan v. City of Tigard*, 129 L. Ed. 2d 304, some members of this Court have continued to express frustration at the "confused nature of some of [this Court's] takings case law" and have observed that certiorari has been granted "in takings cases without the existence of a conflict." *Parking Association of Georgia, Inc. v. City of Atlanta, Georgia*, 132 L. Ed. 2d 273, denial of petition for writ of certiorari, Thomas, J. and O'Connor, J., dissenting. There is no such absence of conflict in this case because California has consistently misapplied the takings analysis carefully developed by this Court and, as shown above, this misapplication has been gaining an increased acceptance among state and federal circuit courts. Further, the recalcitrance of the California judiciary has

created a direct conflict with New York state courts because those courts have followed the dictates of *Nollan* and *Dolan*.

C. A Conflict Between the New York and California Courts Exists Because New York Follows This Court's Nollan and Dolan Decisions While California Does Not

In addition to conflicting with the holdings of this Court, the regulatory takings decisions of the state courts of California have come into direct conflict with the New York State Court of Appeals on federal takings issues. This conflict between the courts of the most populous states of the Union on federal constitutional questions can only be resolved by a timely and forceful ruling by this Court.

In contrast to the labored efforts of the California judiciary to evade this Court's teaching in *Nollan* and *Dolan*, the highest court of the State of New York has applied the heightened standards of review set forth in these cases to strike down overzealous regulation of private property both facially and as applied. While the California Court of Appeal was evading *Nollan* by concocting the "possessory takings" doctrine of *Blue Jeans Equities*, the New York State Court of Appeals promptly acknowledged that

> the "close nexus" test ... requires "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d at 1068.

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking arising from a rent control measure in *Manocherian v. Lenox Hill Hospital*, 618 N.Y.S.2d 857. Applying the heightened scrutiny required by this Court, the New York panel observed that *Nollan* and *Dolan* "establish a ***constitutional minimum floor of protection which this***

Court lacks authority to diminish under the supremacy clause." 618 N.Y.S.2d at 860 (emphasis added).

In sharp contrast to the New York court's regard for the Supremacy Clause, California has responded to *Dolan* by concocting a new rationale to evade this Court's regulatory takings doctrine. The case at bar exemplifies such evasion, where this Court's *Nollan* ruling was cited but not discussed. Instead, the appellate court summarily concluded that "[o]ur courts have routinely upheld relocation assistance conditions imposed when an apartment owner seeks permission to convert to condominiums (citations) and we see no reason why the result ought to be different in the context of mobilehomes." App. 4-5. By failing to apply *Nollan* and *Dolan*, the court below has come into direct conflict with the state courts of New York, as well as this Court.

II

THE APPELLATE COURT FAILED TO APPLY HEIGHTENED SCRUTINY AND, HAD IT DONE SO, WOULD HAVE FOUND A COMPENSABLE TAKING UNDER EITHER PRONG OF AGINS

A. The Lower Court Did Not Apply Heightened Scrutiny to the Condition

In erroneously upholding the validity of Resolution No. 91-014, the court below fundamentally misconstrued the legal question that was before it. By framing the issue as "whether the relocation assistance conditions imposed by the City of Carson are reasonable," App. 5, the Court of Appeal invoked a deferential standard of review which has been twice repudiated by this Court. Instead of applying heightened scrutiny to the City's park closure conditions, the appellate court merely held that "substantial evidence supports the trial court's findings" that the park closure conditions did not comprise a taking. As this Court well knows, such a deferential standard is wholly inadequate for

a regulatory takings challenge, and constitutes independent grounds for reversal.

The conclusory, highly deferential analysis of the court below directly contravenes the constitutional mandate of this Court as expressed in *Nollan* and *Dolan*. The Court of Appeal's failure to apply any semblance of heightened scrutiny to the City's park closure conditions was erroneous in itself, and contributed to a clearly erroneous finding of constitutionality.

B. The Conversion Ordinance Fails to Substantially Advance a Legitimate State Interest

Regardless of its economic impact, a land use restriction will constitute a taking if it fails to "substantially advance legitimate state interests." *Agins v. Tiburon*, 447 U.S. at 262. This rule was first given analytical substance in *Nollan v. California Coastal Commission*, 483 U.S. 825.

As set forth in *Nollan*, a legitimate state interest is one ***directly related*** to a public burden that would be created by the proposed land use, which would justify outright denial of the property owner's application. *Nollan*, 483 U.S. at 835-37. Substantial advancement means directly mitigating that public burden.

In the case at bar, the City is requiring the Wongs to pay more than $1.4 million as a condition of closing their mobile home park. The ostensible purposes of the City's park closure conditions are recited in Resolution No. 91-014. These include "protect[ing]" the investment of mobile home coach owners, while allowing park owners to "change the use of the[ir] property without incurring unreasonable burdens." The record indicates that the appraised value of the subject coaches, including all improvements, is $641,859. Thus, even if the Wongs were responsible for insuring their residents against any risk of loss, the maximum liability this could generate is less than 50% of the $1.4 million demanded

by the City. In essence, the City is requiring the Wongs to pay each of their residents 100% of the market value of their mobile home coaches--plus an additional $650,000 to ransom the Wongs' own property! Such a requirement flies in the face of the "rough proportionality" test of *Dolan*.

Rather than engaging in close scrutiny of Resolution No. 91-014 as required by *Nollan* and, rather than requiring the City to carry its burden of proof as required by *Dolan*, the Court of Appeal upheld the City's conditions without even bothering to examine their impact. The Court of Appeal's inquiry began and ended with a recitation of Government Code § 65863.7. App. 5. It was, however, "the City's RIR ordinance that was the issue in the case (App. 2), *not* Government Code § 65863.7. Having determined that state law authorizes relocation fees not exceeding "reasonable costs of relocation," the appellate panel immediately proclaimed that Resolution No. 91-014 substantially advances a legitimate state interest. *Id.* The actual impact of the City's conditions was not even examined!

This Court's requirement that challenged regulations must substantially advance legitimate state interests requires more than a mere genuflection toward the government's police power. In *Nollan*, this Court looked past the Coastal Commission's avowed objective and found that the actual purpose served by its permit condition was, "quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." 483 U.S. at 837. Comparable scrutiny of Resolution No. 91-014 would reveal that its purpose and effect is simply to transfer a valuable property interest from mobile home park owners to the coach owners who reside on their land. It cannot seriously be argued that such a special interest transfer, extorting assets from one class of property owners and shifting them to another, complies with the "substantial

advancement" test as that standard has been set forth in *Nollan* and *Dolan*.

C. Resolution No. 91-014 Deprives the Wongs of Economically Viable Use of Property

Turning to the second prong of the regulatory takings inquiry, this Court has made it clear that land use restrictions which deprive owners of economically viable use of their property will violate the Takings Clause regardless of the merits of the state interests which they may advance. *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798; *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984). The Court of Appeal committed yet another fundamental error by failing to subject Resolution No. 91-014 to this constitutionally mandated, independently sufficient test for a regulatory taking.

There can be no doubt that the Wong's right to occupy a rent-controlled space on their land in perpetuity is a protected property interest under the Takings Clause. This Court has defined the interests subject to constitutional protection as all those rights inhering in an individual's relation to the thing owned, including the rights of possession, use, and disposal. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Protected property interests include not just fee interests and leaseholds, but "every sort of interest the citizen may possess." *Id.*

Requiring the Wongs to make cash payments to recover the value of their own property graphically demonstrates that the City has deprived the Wongs of any economically viable use of this valuable property interest. Under the clear standards laid down by this Court, this deprivation violates the Takings Clause in and of itself, without regard to the legitimacy of the governmental purposes which might be advanced thereby.

D. The City's Park Closure Conditions Unfairly Require the Wongs to Bear a General Public Burden

The essential purpose of the Takings Clause is to place a check on the government's exercise of the police power at the expense of individual rights. The ultimate question in considering whether a regulation has gone too far is whether it "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In addition to examining the nature of the state action embodied in a regulation and its economic impact on property owners, the Supreme Court has assigned primary significance to this question of basic equity. The issue of disproportionate impact permeates the *Nollan* and *Dolan* decisions and underlies all of the specific "ad hoc" balancing tests this Court has applied to the takings question.

In the case at bar, the conditions set forth in Resolution No. 91-014 are intended to benefit a narrowly circumscribed class of citizens, namely those persons of low or moderate income whose principal asset is their mobile home coach. No one would dispute that the protection of people whose circumstances make them deserving of "unique protection" is a worthy objective. *See, e.g.*, Civ. Code § 798.55(a). But that does not establish that the Wongs and other park owners may be compelled to bear the full costs of such a "comprehensive program." *Nollan*, 483 U.S. at 841.

For 15 years, the Wongs have provided affordable housing for the residents of the Avalon Carson Mobile Home Park. During this time, the City has continuously regulated the Wongs' property to ensure that their residents have enjoyed rents below competitive market levels. In addition to bearing this long burden, distributing the full value of their own property to the residents of their park, or ransoming the right to occupy their own land, grossly

exceeds the Wongs' rightful share of the societal burden of providing affordable housing.

The issue is not whether special subsidies to mobile home coach owners are worth the costs, but rather who should pay. "[T]he question at bottom is upon whom the loss ... should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). As Justice Scalia concluded regarding the governmental objective in *Nollan*, "[t]he Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. ... [If California] wants an easement across the Nollans' property, it must pay for it." 483 U.S. at 841-42. This conclusion is directly applicable to the case at bar. If the City wants to redistribute the value of the Wongs' property to the owners of mobile home coaches, it is constitutionally required to pay for it.

CONCLUSION

For the foregoing reasons, amicus Pacific Legal Foundation respectfully urges this Court to grant certiorari.

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Respectfully submitted,

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